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Supreme Court, U.S.
FILED
MAY 2 2003
OFFICE OF THE CLERK

No. 02-1460

In The

Supreme Court of the United States

JERRY CHARLES VAUGHAN,

Petitioner,

v.

FRED LAWRENCE COX , OFFICER, Individually and in his official capacity as an Officer of the Coweta County Sheriff's Department; COWETA COUNTY, GEORGIA; MIKE YEAGER, SHERIFF, in his official capacity as Sheriff of Coweta County,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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26 p/p

RESPONDENTS' COUNTER-STATEMENT OF THE QUESTION PRESENTED

Whether the Court of Appeals correctly applied settled qualified immunity law, most recently articulated by this Court in *Hope v. Pelzer*, 536 U.S. 730 (2002), in holding that, as of January 5, 1998, it was not clearly established that shooting to disable a fleeing vehicle or its driver was an unconstitutional application of deadly force under the circumstances of this case, where even the plaintiff passenger admitted that the vehicle posed an immediate danger to the lives and safety of innocent motorists in its path.

LIST OF PARTIES

Jerry Charles Vaughan, Petitioner-Plaintiff

Fred Lawrence Cox, Respondent-Defendant

Sheriff Michael Yeager, in his Official Capacity, Respondent-Defendant

Coweta County, Georgia, Respondent-Defendant

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RESPONDENTS' BRIEF IN OPPOSITION TO PETITION

Respondents, Deputy Sheriff Fred Lawrence Cox (in his individual and official capacity), Sheriff Michael Yeager (in his official capacity) and Coweta County, Georgia, respectfully submit this brief in opposition to the petition for writ of certiorari.

INTRODUCTION

On remand from this Court to reconsider its prior opinion in light of *Hope v. Pelzer*, 536 U.S. 730 (2002), the Eleventh Circuit held that Deputy Cox was entitled to qualified immunity under the circumstances of this case. In so holding, the Eleventh Circuit did not fail to follow *Hope v. Pelzer*, nor did it decide any important, unsettled question of federal law or create any conflict among the circuit courts. The petitioner attempts to suggest otherwise only by erroneously characterizing the opinion below as if it did several things it did not.

First, the opinion below did not, as petitioner contends, apply an "improperly rigid analysis," inconsistent with the *Hope* decision, to its qualified immunity determination. To the contrary, as is clear from the face of the opinion, the Eleventh Circuit properly recognized the principles set out in *Hope* and applied those principles in determining that Deputy Cox is entitled to qualified immunity under the circumstances of this case.

Second, the opinion below did not, as petitioner contends, determine that the requirement of *Tennessee v. Garner*, 471 U.S. 1 (1985), that an officer give a warning "where feasible" before using deadly force is inherently

"incapable" of providing fair warning that specific conduct is unconstitutional. Instead, the Eleventh Circuit held merely that *Garner* did not place Deputy Cox on notice that a warning was required under the circumstances of this case.

Third, the opinion below does not, as petitioner contends, conflict with decisions of the other circuit courts. The various cases cited by petitioner merely deny summary judgment based on materially different facts, and do not reflect a split among the circuits.

Fourth, the opinion below does not, as petitioner contends, establish that courts can ignore standards of police procedure in cases where those standards articulate constitutional minimums. To the contrary, the Eleventh Circuit's opinion merely reflects the fact that, in this case, petitioner failed to establish that the police standards he cited reflected constitutional minimums, as opposed to policy concerns.

Ultimately, the opinion below simply applied established qualified immunity law to the particular facts at issue. There is no issue warranting review on certiorari.

STATEMENT OF THE CASE

In a high-speed interstate chase on January 5, 1998, the petitioner, Jerry Charles Vaughan, was paralyzed by a bullet fired by Deputy Cox of the Sheriff's Department of Coweta County, Georgia. At the time, Vaughan was a passenger in a stolen truck that, as he admits, was recklessly fleeing police pursuit, endangering the lives and safety of other motorists during the morning rush hour

heading into Atlanta, Georgia. Deputy Cox hit Vaughan in an attempt to disable either the truck or the driver. Pet. App. 14.

The chase started when Deputy Cox and fellow deputy sheriff, Jeff Looney, received a report of a stolen truck heading north on I-85 towards Atlanta. Officers Cox and Looney soon observed a truck matching this description. Pet. App. 12-13, 37-38. Vaughan does not dispute that the officers had probable cause to believe that this was the stolen truck, as, in fact, it was. *Id.* at 42, 46. Nor does Vaughan deny that he and the driver stole that truck, as well as an attached trailer, two "waverunners" and another truck that they had earlier abandoned. Instead, he pleaded the Fifth Amendment.

After confirming that the occupants and the truck met the reported description, the officers attempted to stop the truck through a "rolling roadblock." Pet. App. 13, 38-39. Deputy Cox positioned his patrol car in front of the truck, with Officer Looney following the truck from behind. *Id.* Vaughan admits that, at least by this time, it was clear that the officers wanted the truck to pull over. *Id.* Deputy Cox then slowed down in an effort to induce the truck to reduce its speed. He testified that the truck rammed the back of his patrol car, almost causing him to lose control of his vehicle. *Id.* Although Vaughan disputes that the driver intentionally rammed Deputy Cox's patrol car, it is undisputed that, instead of slowing down for the rolling roadblock, the truck struck his vehicle at least once from behind. *Id.*

There is also no dispute that the driver refused to stop even after striking Deputy Cox's patrol car. Pet. App. 13, 40. Instead, as Vaughan admitted at his deposition (p. 89),

the truck was "clearly trying to elude the police." Vaughan also admitted that the driver's reckless operation of the truck following this impact threatened the safety of other motorists:

> Q. Okay. Obviously [the driver is] going over the speed limit, correct?
>
> A. Yes, sir.
>
> Q. He's weaving in and out of traffic, correct?
>
> A. Yes, sir.
>
> Q. And he has wave-runners on the back of his vehicle, correct?
>
> A. Yes, sir.
>
> Q. So he's driving in a dangerous manner at this time frame, isn't he?
>
> A. Yes, sir.
>
> Q. And he's driving in a reckless manner, correct?
>
> A. Yes, sir.
>
> * * *
>
> Q. And he was putting other citizens on the interstate driving that morning in danger, correct?
>
> A. Yes, sir.

Vaughan Dep., pp. 87-88; Pet. App. 40. Moreover, Vaughan concedes that the driver was driving in this reckless and dangerous manner before Deputy Cox fired the first shot:

> Q. So when the police turned the lights on, you took off?

A. He [the driver] did. In other words, he sped up faster.

Q. Right. So before the shots are fired, he speeds up, correct?

A. When he [the police] turns the blue lights on, we speed up to probably about 80 or 85.

Q. So in effect, before shots are fired, he speeds up to avoid the police, correct?

A. Basically.

Q. Okay. And he's going 80 miles an hour now before shots are fired, correct?

A. Yes, sir.

Q. And it's clear at this point that he's trying to elude the police, correct? They got the lights on, and he, instead of slowing down, is speeding up, correct?

A. Yes, sir.

Q. And he's got wave-runners on the back of his truck, correct?

A. Yes, sir.

Q. And he's going 80 miles an hour with wave-runners on the back of his truck, correct?

A. Yes, sir.

Q. And there's other vehicles on the road and on the interstate that morning; is that correct?

A. That's correct.

Q. So he's driving before shots are fired in a dangerous manner, correct?

A. Yes, sir.

Q. Okay. And he's driving wrecklessly [sic] at that point, correct?

A. Yes, sir.

Q. And then based on your recollection of the chronology of the events, shots are fired, correct?

A. That's correct.

Vaughan Dep., pp. 89-91; Pet. App. 40, 46.

By this point, Deputy Cox had dropped back alongside the driver's side of the truck. He testified that the driver veered aggressively in his direction, attempting to side-swipe his patrol car. Pet. App. 40. He then fired three bullets at the truck, trying to disable the truck or the driver. *Id.* at 14. One of these shots struck Vaughan, paralyzing him from the waist down.[1] Vaughan disputes that the truck swerved toward Deputy Cox's patrol car, but, as noted above, he does not dispute that the truck was endangering the lives and safety of other motorists in its path before Deputy Cox fired his weapon. *Id.* at 40, 46.

The chase did not end after that first volley of shots. The truck continued to weave recklessly in and out of traffic at high speeds, colliding with other motorists. Pet. App. 41. At one point, the truck pulled off the interstate at

[1] Vaughan initially claimed that he was struck by a second volley of shots that occurred much later in the chase. But, facing summary judgment, Vaughan changed his story to claim that this first volley of shots struck him. For the purposes of the appeal below and this petition, we assume that his current account is true.

an exit, barreled through a busy intersection at high speed, running a stop sign and again colliding with innocent motorists. *Id.* Finally, while trying to force its way between two vehicles, the driver lost control and crashed. *Id.* at 42.

REASONS FOR DENYING THE WRIT

A. The Eleventh Circuit's opinion on remand properly applies the qualified immunity analysis set out by this Court in *Saucier v. Katz*, *Anderson v. Creighton* and, most recently, *Hope v. Pelzer*.

In *Hope v. Pelzer*, 536 U.S. 730 (2002), this Court confirmed its previous formulations of qualified immunity doctrine in *Saucier v. Katz*, 533 U.S. 194 (2001), and *Anderson v. Creighton*, 483 U.S. 635 (1987), repeatedly citing to both decisions. The *Hope* decision reaffirmed that, in determining whether a state actor had "fair warning" that his actions were unconstitutional, "general statements of the law are not inherently incapable of giving fair and clear warning." 536 U.S. at 741, *citing United States v. Lanier*, 520 U.S. 259, 270-71 (1997).

As the *Hope* opinion states:

> [Q]ualified immunity operates to ensure that before they are subjected to suit, officers are on notice that their conduct is unlawful. For a constitutional right to be clearly established, its contours must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. This is not to say that an official action is protected by qualified immunity unless the very action in question has

> previously been held unlawful; but it is to say that in the light of pre-existing law the unlawfulness must be apparent.

536 U.S. at 739 (internal quotations omitted), *citing Saucier*, 533 U.S. at 206; *Anderson*, 483 U.S. at 640; *Mitchell v. Forsyth*, 472 U.S. 511, 535 n.12 (1985).

This case was remanded to the Eleventh Circuit for reconsideration in light of *Hope*. In its opinion on remand, the Eleventh Circuit recited that:

> In determining whether the contours of a constitutional right are clearly established, we examine cases that announce general constitutional rules or apply those rules to factual circumstances to determine if a reasonable public official, who is charged with knowledge of such opinions, would have understood the constitutional implications of his conduct. With regard to this inquiry, the Supreme Court in *Hope* cautioned that we should not be unduly rigid in requiring factual similarity between prior cases and the case under consideration. The "salient question," the Court said, is whether the state of the law gave the defendants "fair warning" that their alleged conduct was unconstitutional.

Pet. App. 3-4, *citing Hope*, 536 U.S. at 741. Despite the Eleventh Circuit's clear acknowledgement of the import of the *Hope* decision, petitioner asserts that the Eleventh Circuit applied an "improperly rigid analysis" of qualified immunity on remand. However, this assertion reflects a misreading of the Eleventh Circuit's holding.

The Eleventh Circuit did not hold that qualified immunity is available in the absence of a prior case with closely similar facts. To the contrary, the Eleventh Circuit

explicitly recognized that, "a general constitutional rule 'may apply with obvious clarity to the specific conduct in question.'" Pet. App. 5, *citing Lanier*, 520 U.S. at 271. The Eleventh Circuit went on to hold only that "the rule announced in [*Tennessee v.*] *Garner*, [471 U.S. 1 (1985), the only authority on which Petitioner relied in his qualified immunity analysis,] does not apply with 'obvious clarity' to Deputy Cox's conduct *in this case*." Pet. App. 5 (emphasis added). Thus, the Eleventh Circuit properly considered the qualified immunity question in light of the principles articulated in *Hope*.[2]

Petitioner continues to argue that, because the Eleventh Circuit held that a jury could find Deputy Cox's conduct unconstitutional, the finding of qualified immunity was improper. But this ignores the established distinction between the analysis of whether a constitutional violation has occurred, on the one hand, and whether a

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[2] Citing two other decisions of the Eleventh Circuit in cases remanded in light of *Hope*, petitioner asserts broadly that the Eleventh Circuit "continues to *require* cases with materially similar facts." Pet. App. 11 (emphasis in original). Neither of the cases cited by petitioner supports this argument. To the contrary, in both of the cases cited by petitioner, as in this case, the Eleventh Circuit recognized and applied the qualified immunity principles set out in *Hope*. *See Willingham v. Loughnan*, 321 F.3d 1299, 1301 (11th Cir. 2003) ("The Supreme Court in the *Hope* opinion stresses that preexisting caselaw with 'materially similar' or 'fundamentally similar' facts is not always necessary to give an official 'fair warning' of unlawful behavior. 122 S. Ct. at 2516.... General statements of the law contained within the Constitution, statute or caselaw may sometimes provide 'fair warning' of unlawful conduct."); *Thomas v. Roberts*, No. 00-11361, 2003 U.S. App. LEXIS 4153, at *15 (11th Cir. Mar. 10, 2003) ("Factually similar cases are not *always* necessary to establish that a government actor was on notice that certain conduct is unlawful.") (emphasis in original).

state actor is entitled to qualified immunity, on the other hand. As this Court held in *Saucier*:

> The concern of the immunity inquiry is to acknowledge that reasonable mistakes can be made as to the legal constraints on particular police conduct. It is sometimes difficult for an officer to determine how the relevant legal doctrine, here excessive force, will apply to the factual situation the officer confronts. An officer might correctly perceive all of the relevant facts but have a mistaken understanding as to whether a particular amount of force is legal in those circumstances. If the officer's mistake as to what the law requires is reasonable, . . . the officer is entitled to the immunity defense.

533 U.S. at 205. The Eleventh Circuit's application of the two-part inquiry set out in *Saucier* – first, considering whether the conduct at issue could be found unconstitutional, and only then considering whether the officer was entitled to qualified immunity – to the facts of this case raises no issue worthy of a grant of certiorari.[3]

At bottom, the Eleventh Circuit correctly identified and applied the principles of qualified immunity set out in *Hope*. Petitioner's real quarrel is with the Eleventh

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[3] The petitioner also argues that the Eleventh Circuit's opinion "provides no guidance" for future cases. This argument misconstrues the Eleventh Circuit's opinion, which, as petitioner acknowledges, held that a jury could find conduct such as Deputy Cox's to be unconstitutional. As *Saucier* requires, *see* 533 U.S. at 201, the Eleventh Circuit first analyzed the constitutionality of Deputy Cox's conduct, and only reached the qualified immunity question after it had determined that Deputy Cox's conduct could be found unconstitutional.

Circuit's particular determination that the general constitutional rule set out in *Tennessee v. Garner* did not apply with "obvious clarity" to Deputy Cox's conduct *in this case*. This case-specific determination presents no issue of "extreme importance" worthy of a grant of certiorari.

B. The Eleventh Circuit did not hold that *Tennessee v. Garner*'s general requirement that an officer give a warning before using deadly force "where feasible" is "incapable" of providing fair notice for qualified immunity purposes.

Tennessee v. Garner, 471 U.S. 1 (1985), set out general constitutional parameters for the use of deadly force to stop a fleeing felony suspect. Such force is constitutionally permissible, *Garner* holds, if (1) "the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others," (2) such force is "necessary to prevent escape," and (3) "where feasible, some warning has been given." *Id.* at 11-12. In his second argument, petitioner asserts that the Eleventh Circuit's opinion somehow establishes as a matter of law that the warning requirement of *Garner* is inherently "incapable" of providing fair notice that an officer's conduct violates the constitution. Pet. 16-19.

Again, petitioner misreads the Eleventh Circuit's holding. As is clear from the opinion, the Eleventh Circuit did not hold that *Garner* could not provide "fair notice" that a state actor's conduct was unconstitutional in an appropriate case; it merely held that the *Garner* rule did not provide "fair notice" in *this* case. As the Court held:

> The *Garner* rule does not *always* provide a clear answer as to whether a particular application of

> deadly force will be deemed unjustified by the courts. Whether Deputy Cox had arguable probable cause, whether deadly force was necessary to prevent Vaughan's escape, and whether a warning was feasible *in the instant case* are all questions that the general *Garner* rule does not clearly answer. Because the *Garner* rule, standing alone, does not apply with obvious clarity such that Deputy Cox was given fair warning that his alleged conduct was unconstitutional, we must consider whether, in light of *Hope*, the cases applying the *Garner* rule provided fair warning to Deputy Cox that his conduct violated Vaughan's constitutional rights.

Pet. App. 5 (emphasis added; internal citations/quotations omitted). Once again, petitioner's real argument is that the Eleventh Circuit erred in applying established principles of qualified immunity to the facts of this case. Petitioner seeks to use this Court as a court of error, not a court of certiorari.

Moreover, the Eleventh Circuit not only applied the correct law, but applied it correctly. There is nothing erroneous, let alone cert-worthy, in holding that a law enforcement officer could reasonably, even if mistakenly, conclude that shooting to disable the truck or the driver was constitutionally permissible under the facts of this case. *Garner* permits the use of deadly force "[w]here the officer has probable cause to believe that the suspect poses a threat of serious physical harm . . . to others." 471 U.S. at 11.[4] Here the circumstances of the case, most notably

[4] Petitioner asserts that *Garner* permits the use of deadly force only if the suspect threatens the officer with a weapon, or there is

(Continued on following page)

petitioner's own testimony, permitted a reasonable law enforcement officer to believe that the truck posed a threat of serious physical harm – even death – to other motorists in its path.

In reality, petitioner urges this Court to go well beyond *Hope* and hold that the general requirement in *Garner* that a warning be given "where feasible" is *always* sufficient, without further guidance, to put officers on notice as to whether a warning would be feasible in particular factual circumstances. This Court considered and rejected a strikingly similar argument in *Saucier*. There, this Court held that the general rule, set out in *Graham v. Connor*, 490 U.S. 386 (1989), that the use of "excessive" force is unconstitutional is not always sufficient, in itself, to put officers on notice of what force will be considered "excessive" in particular circumstances. As the *Saucier* opinion holds: "*Graham* does not always give a clear answer as to whether a particular application of force will be deemed excessive by the courts. This is the nature of a test which must accommodate limitless factual circumstances." 533 U.S. at 205.

> [T]here is no doubt that *Graham* . . . clearly establishes the general proposition that use of force is contrary to the Fourth Amendment if it is excessive under objective standards of reasonableness. Yet that is not enough. . . . The relevant,

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probable cause to believe that the suspect has committed a crime involving infliction or threatened infliction of serious physical harm. Pet. 16. Although *Garner* states that use of deadly force would be permissible in these two circumstances (assuming a warning, if feasible, had been given), the *Garner* holding is not so limited.

> dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable officer that his conduct was unlawful *in the situation he confronted.*

Id. at 201-02 (emphasis added). *Garner*, like *Graham*, establishes broad outlines for the constitutional use of force, but its application to a particular situation may often be (as it is here) something as to which law enforcement officers could make reasonable mistakes.

C. The Eleventh Circuit's opinion does not conflict with the opinions of other federal appellate courts.

Applying a scatter-shot approach, petitioner suggests that the Eleventh Circuit's opinion conflicts with opinions from other circuits. But these opinions merely find, on substantially different facts, that qualified immunity is inappropriate. None conflict with the Eleventh Circuit's opinion in this case.

In *Estate of Starks v. Enyart*, 5 F.3d 230 (7th Cir. 1993), the officer fired at a suspect who was driving towards him in a stolen cab. The Seventh Circuit held that the officer was not entitled to summary judgment on qualified immunity because, resolving all disputes in favor of the plaintiff, the fleeing cab was a threat to the officer only because he stepped directly into its path without necessity. There was no evidence or argument that the cab posed a threat to others. *Enyart* is a narrow holding, driven by the specific facts of the case, and does not conflict with the opinion below. And *United States v. Bradley*, 196 F.3d 762 (7th Cir. 1999) is markedly different than Vaughan's case because the suspect (who had rolled

through a stop sign) was driving at 25 miles per hour and posed no threat to anyone when the pursuing police officer shot him in the back.

McCaslin v. Wilkins, 183 F.3d 775 (8th Cir. 1999), neither helps the petitioner nor conflicts with the opinion below. There the officer shot the driver of a fleeing truck, but only *after* it had left the highway and rolled down an embankment. The Eighth Circuit held that the officer was not entitled to qualified immunity because, construing the evidence in favor of the plaintiff, the truck did not remain a threat to anyone after leaving the highway. The Eighth Circuit distinguished its earlier decision in *Cole v. Bone*, 993 F.2d 1328 (8th Cir. 1993), in which "an officer used deadly force to stop a renegade truck driver, who was at the time still in the process of fleeing from the police on a busy highway." 183 F.3d at 779. *Cole* held that the use of force was constitutionally reasonable under those circumstances. Vaughan's case is like *Cole*, not *McCaslin*, and there is no conflict between the Eighth and Eleventh Circuits.

Wilson v. City of Des Moines, 293 F.3d 447 (8th Cir. 2002), likewise is of no help to petitioner. In that case, two police officers shot an unarmed suspect after the suspect had ceased fleeing and had turned to face the officers. The Eighth Circuit noted that, although the officers both stated that they thought the suspect was aiming a gun at them when he turned to face them, there were significant factual discrepancies between the two officers' testimony. Given that a jury could find that the officers' story was not credible, summary judgment on the issue of qualified immunity was not warranted.

Deorle v. Rutherford, 272 F.3d 1272 (9th Cir. 2001), *cert. denied*, 536 U.S. 958 (2002), also bears no resemblance to this case. There an officer fired a lead-filled "beanbag round" at the head of a person "who was walking at a 'steady gait' in his direction" but who "was unarmed, had not attacked or even touched anyone, had generally obeyed the instructions given him by various police officers, and had not committed any serious offense." 272 F.3d at 1275. Unlike this case, *Deorle* was not a case in which "the officer has probable cause to believe that the suspect poses a threat of serious physical harm . . . to others." *Garner*, 471 U.S. at 11. Nor does the legal analysis in *Deorle* conflict with the opinion below. The officer admitted knowing that the bean bag round was potentially lethal at the distance from which he fired, and a reasonable officer would have known from existing law that the use of lethal force was not justified under those facts. Under those circumstances, the Ninth Circuit appropriately declined to hold that the officer was entitled to qualified immunity simply because there were no published cases involving the use of lead-filled bean bag rounds. Nothing in this analysis conflicts with the Eleventh Circuit's opinion below.

In *Rosales v. City of Phoenix*, No. 99-17204, 2001 U.S. App. LEXIS 27599, at *3 (9th Cir. Dec. 26, 2001), *cert. denied*, 123 S. Ct. 109 (2002), the Ninth Circuit not surprisingly affirmed the denial of summary judgment where the officers shot a fleeing suspect in the back, but admitted that they "did not consider [him] a fleeing felon," that he "never turned and aimed his gun at them," and there was no evidence that he posed a threat to others. In *Bray v. County of San Diego*, No. 93-55446, 1994 U.S. App. LEXIS 4289 (9th Cir. Mar. 2, 1994), the Ninth Circuit

affirmed the denial of summary judgment on a qualified immunity defense where the officer fired as the suspect was backing his truck towards the officer's patrol car in a parking lot from a distance of ten feet. Under those facts, the officer had no reasonable basis to fear for his own life or safety, and the case did not involve any threat to others.

There is similarly no conflict between the opinion below and *Harris v. Roderick*, 126 F.3d 1189 (9th Cir. 1997), *cert. denied*, 522 U.S. 1115 (1998), which arose from the 1992 events at Ruby Ridge. The Ninth Circuit affirmed the denial of qualified immunity with respect to the "Special Rules of Engagement" formulated for Ruby Ridge, which allegedly included the authorization to shoot on sight any adult male in the vicinity of the Weaver Cabin, regardless of any threat he posed. 126 F.3d at 1202. Taking this allegation as true, the Ninth Circuit held that it was clearly established that those Special Rules of Engagement did not comply with *Tennessee v. Garner*. *Id.* The only specific shooting examined by the Ninth Circuit is not analogous to Vaughan's case. The agent shot as the plaintiff was running back to the cabin and was not making an aggressive move of any kind. *Id.* at 1202-03. At this point, the officer and his fellow agents "were safely ensconced on the hill overlooking the Weaver cabin." *Id.* *Harris* does not conflict with the opinion below.

Petitioner also asserts that the Eleventh Circuit's opinion conflicts with opinions holding that whether the force used by a state actor was "excessive" is a jury question. *See Barlow v. Ground*, 943 F.2d 1132 (9th Cir. 1991); *Posr v. Doherty*, 944 F.2d 91 (2d Cir. 1991); *Dixon v. Richer*, 922 F.2d 1456 (10th Cir. 1991). None of these cases conflicts with the Eleventh Circuit's opinion here, because

the Eleventh Circuit's opinion here expressly acknowledges that a jury could find that the force used was unconstitutional. As discussed above, the Eleventh Circuit's holding that Deputy Cox is entitled to qualified immunity is based on the analytically distinct determination that, while Deputy Cox's belief that his conduct was constitutional might have been mistaken, his mistake was a reasonable one.

In sum, the cases cited by petitioner simply deny summary judgment under facts materially different than those at issue here. Instead of demonstrating any conflict among the circuits, these cases simply emphasize the factually intensive nature of the qualified immunity defense.[5]

D. No issue of "great importance" is raised by the Eleventh Circuit's determination that state and local police procedure standards did not establish constitutional minimums in this case.

In his final argument, petitioner suggests that the Eleventh Circuit should have deferred to local, state, and

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[5] Petitioner also argues that the Eleventh Circuit "refused" to look outside its own Circuit for a "consensus of persuasive authority" that could amount to "clearly established law." Pet. 23. Petitioner, however, never pointed to any "consensus of persuasive authority" from other jurisdictions in this case. To the contrary, the available authority from other jurisdictions was at best mixed, with the closest cases supporting a finding of qualified immunity. *See, e.g., Smith v. Freland*, 954 F.2d 343 (6th Cir. 1992); *Cole v. Bone*, 993 F.2d 1328 (8th Cir. 1993). The Eleventh Circuit had no need to determine in this case whether a "consensus of persuasive authority" could amount to "clearly established law" for qualified immunity purposes.

national standards of police practice which allegedly prohibited Deputy Cox's conduct. Petitioner, however, has never established that the police procedure guidelines on which he relies were designed to reflect constitutional minimum standards of conduct. To the contrary, police departments and advisory organizations adopt policy guidelines for a variety of purposes, including protection of public and officer safety and even good public relations.[6] Absent some evidence that the specific standards at issue reflect constitutional minimums, it would be inappropriate to rely on those standards to determine whether Deputy Cox had "fair warning" that his conduct was *unconstitutional* (as opposed to merely being in violation of a departmental rule). The Eleventh Circuit committed no error, and certainly no error worthy of a grant of certiorari, in declining to treat the police procedures cited by petitioner as if they controlled the constitutional question.[7]

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[6] The police regulations cited by petitioner are distinguishable from the Department of Justice Report cited in *Hope*, because the record in *Hope* indicated that the Department of Justice Report was aimed specifically at redressing constitutional violations in Alabama's prison system. *See Hope*, 536 U.S. at 744.

[7] Petitioner seems to be seeking a holding from this Court that any violation of a police procedure or guideline is *necessarily* a violation of a clearly-established rule of constitutional law. Such a holding would not only be a drastic and unwarranted expansion of the holding of *Hope*, but would also restrict police departments in their ability to set procedures and guidelines that exceed constitutional minimums.

CONCLUSION

In the opinion below, the Eleventh Circuit applied correct principles of qualified immunity law in a manner that does not warrant review on certiorari. The writ should be denied.

Respectfully submitted,

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May 2, 2003